No. 83-1695

In the Supreme Court of the United States

OCTOBER TERM, 1983

HERB NEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the mailings of warrants by a county in payment for supplies ordered from petitioner were an integral part of petitioner's fraudulent scheme.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 718 F.2d 1505.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1983. A petition for rehearing was denied on February 17, 1984 (Pet. App. C). The petition for a writ of certiorari was filed on April 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted on 33 counts of mail fraud, in violation of 18 U.S.C. 1341 and 2.[1] He was sentenced to five years' imprisonment

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[1] Petitioner was acquitted on one count.

on each count, Count 2 to run consecutively to Count 1 and the remaining counts to run concurrently with Count 1, for a total of 10 years' imprisonment. He was also fined $1,000 on each of Counts 1 and 2. Pet. App. 1a-2a.

1. The evidence at trial showed that from 1975 through April 1981 petitioner worked as a salesman for three companies in Ponca City, Oklahoma, that sold equipment and materials to Oklahoma counties for road and bridge building and maintenance. During that time, petitioner paid kickbacks to seven county commissioners. The amount of the kickbacks generally approximated 10% of the purchase price on county procurements. See, *e.g.*, Tr. 509, 513-517 (Counts 1-9), 409, 411-425 (Counts 10, 30-32), 321-325 (Counts 11-23, 34), 616-623 (Counts 24-29), 249-257 (Count 33).

The mechanisms for effectuating the scheme varied. On several occasions, the amount of the kickback was expressly agreed to before the purchase was consummated (see, *e.g.*, Tr. 252-253, 280-281, 303, 325-326, 328, 333, 384-385, 394, 619-621). More often, however, the parties tacitly agreed that a kickback would be forthcoming (see, *e.g.*, Tr. 335, 349, 438, 441, 463-475). Petitioner generally paid the kickback after the materials or supplies were delivered and the county clerk mailed the warrant.[2] See Tr. 254-257; Pet. App. 3a.

Several commissioners accepted "50-50 splits" from petitioner in which the commissioner ordered materials or supplies and the county clerk issued a warrant in payment, but the goods were not delivered and the commissioner and

[2]Warrants are similar to checks. They are issued by county clerks and mailed to vendors in payment for county purchases (Tr. 42-43, 47, 49-50, 53, 98, 110-111, 114-115).

petitioner split the cash.[3] See Tr. 320, 398, 568-570. Occasionally, petitioner offered a county commissioner a lease-purchase agreement. After the commissioner signed the purchase agreement, the contract was assigned to a bank which in turn paid petitioner's company the cash value of the equipment. Thereafter, the county mailed warrants to the bank as monthly payments for the equipment and petitioner paid the commissioner a kickback. See Tr. 252-257, 303-304, 325-328, 384-385, 393-394, 412-416, 418-420, 618-621.

The kickbacks were always in cash and were paid in a surreptitious manner, frequently while petitioner and the commissioner were alone in petitioner's car (Pet. App. 3a).

2. The court of appeals affirmed (Pet. App. 1a-11a). It rejected petitioner's principal argument, which was directed at the five counts involving lease-purchase agreements (Counts 30-34). Since the kickbacks had been paid prior to the time the warrants were mailed, petitioner contended that the mailings were " 'totally unrelated and not an integral part of the scheme' " (Pet. App. 5a). Relying on its decision in *United States* v. *Primrose*, 718 F.2d 1484

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[3]Dorothy Griffin, operator of Griffin Lumber Company, testified that she provided false invoices to petitioner and other vendors. When vendors and commissioners agreed to a "50-50 split" of the warrants issued in payment for materials that were never delivered, a bogus invoice provided the record of a supplier's expenditures that was necessary to maintain the appearance of a bona fide contract. Suppliers commonly gave Griffin checks in payment for the fraudulent invoices; Griffin would then cash the checks, retain 5% to 10% as commission, and return the remainder to the supplier. In this way, a supplier could also discreetly obtain cash to be used for the payment of kickbacks. Tr. 658-661. Griffin provided this service for a supply company that employed petitioner at least 18 times during petitioner's tenure. She also had one meeting with petitioner and the owner of the company at which the owner indicated that he wanted some bogus invoices so " 'he would have some money to operate on with his Commissioners.' " Tr. 660-675; Pet. App. 6a-7a.

(10th Cir. 1983), cert. denied, No. 83-1694 (May 14, 1984), the court concluded (Pet. App. 5a) that "the mailing of the warrants * * * was an essential part of the scheme, regardless of whether the kickback was paid before or after the mailing." The court noted (*ibid.*) that whereas *Primrose* involved a defendant who was a county commissioner, petitioner's role as a salesman for various vendors made the "mailing of warrants to the vendors * * * even more closely within the scheme." Moreover, as it had in *United States* v. *Gann*, 718 F.2d 1502 (10th Cir. 1983), the court held that the procedures used in the lease-purchase agreements, where the warrants were mailed to a bank rather than directly to a vendor, did not alter the conclusion that the mailings were "an integral part of the entire transaction and in furtherance of the scheme to defraud" (Pet. App. 6a).

ARGUMENT

Petitioner, relying principally on *United States* v. *Maze*, 414 U.S. 395 (1974), contends that the government failed to prove that the mailings of county warrants were an integral part of the scheme to defraud. This fact-bound contention was properly rejected by the court of appeals. Moreover, this Court recently denied certiorari in two similar cases presenting this issue. *United States* v. *Boston*, 718 F.2d 1511 (10th Cir. 1983), cert. denied, No. 83-1701 (May 14, 1984); *United States* v. *Primrose*, 718 F.2d 1484 (10th Cir. 1983), cert. denied, No. 83-1694 (May 14, 1984). This case presents nothing that would call for a different result.[4]

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[4]Indeed, the Petition for Rehearing (at 2) in *Primrose*, filed by the same counsel who represents petitioner, states that "the fact patterns and legal issues in [t]his case are closely related and virtually identical to those in *Neal*, [and] that this Court should give similar treatment to both cases." We agree; neither case warrants further review.

1. Petitioner first argues (Pet. 12-16) that the government failed to show that the warrants were the source of any money for kickbacks; hence, the mailings were not an integral part of the scheme to defraud. In petitioner's view, the scheme to deprive citizens of their right to uncorrupted government services reached fruition once the goods were delivered to the county. Thus, petitioner contends, the mailings of the warrants were merely incidental. The court of appeals, relying on *Primrose*, correctly rejected this argument (Pet. App. 5a).

In *Primrose*, a county commissioner similarly argued that because the mailings occurred after the kickbacks were paid, they could not have been made as part of the scheme because the fraud had already reached fruition. The court found that view to be too narrow; the scheme to defraud county citizens included not only the commissioners' receipt of kickbacks, but also the supplier's receipt of warrants from the county. The scheme did not reach fruition, then, until the supplier received payment. *United States* v. *Primrose*, 718 F.2d at 1489. See also *United States* v. *Bottom*, 638 F.2d 781, 785-786 (5th Cir. 1981); *United States* v. *Boyd*, 606 F.2d 792, 794 (8th Cir. 1979). As in *Primrose*, the scheme in the instant case included petitioner's receipt of county funds; it was not completed until the warrants were mailed.[5]

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[5] *Parr* v. *United States*, 363 U.S. 370 (1960), upon which petitioner relies (Pet. 15-16), is inapposite. In *Parr*, members of a school board, its secretary, its attorney and bank officers misappropriated the school district's funds. The mailings were alleged to be the school board's assessment and collection of taxes — the source of the misappropriated funds. This Court found that such mailings, made under requirements imposed by state law, were not criminal under the mail fraud statute, even if those who were required to do the mailing planned to steal some of the moneys. 363 U.S. at 387. In the instant case, by contrast, although the commissioners were required by law to buy supplies and to pay for them by warrants, they were not required to purchase the supplies from vendors who paid kickbacks. See *United States* v. *Primrose*, 718 F.2d at 1491.

2. Relying on *United States* v. *Maze*, 414 U.S. 395 (1974), petitioner further argues (Pet. 16-21) that for those counts based on the lease-purchase contracts (Counts 30-34), the monthly mailings of warrants to the banks by the county were unrelated to the scheme; before the contracts were assigned to the bank, petitioner contends, the kickbacks had already been paid and petitioner had already received his money. Thus, he contends that the mailing of the monthly lease-purchase payment was an extraneous detail. Petitioner's argument was properly rejected by the district court and the court of appeals.

At trial, the district court considered whether the monthly mailings of county warrants to the banks were in furtherance of the illegal scheme and determined (Order Denying Defendant's Motion for Verdict of Acquittal at 2-3 (filed Sept. 21, 1982)) that

> the payments made by the County to the banks involved were an integral part of the alleged scheme to defraud, which scheme was not consummated by the payment of the kickbacks, as the seller in each instance still had title to the equipment sold to the County, had agreed to hold the banks harmless and was relying on the payments sent through the mails to avoid default of the lease/purchase agreements, repossession and possible ultimate liability of seller to the banks.

In assigning the lease-purchase agreement to the banks, petitioner assigned only the paper, not the equipment. If the county defaulted, the seller could repossess the equipment and would be accountable to the banks for the remaining monies owed on the contract. Accordingly, the district court found — and the court of appeals agreed — that the monthly mailings of warrants to the bank were an integral part of the scheme.

This arrangement, then, is unlike the facts of *United States* v. *Maze*, *supra*. There the fraudulent credit card scheme had ended before the invoices were mailed. In the instant case, by contrast, the success of petitioner's continuing scheme to pay kickbacks to obtain municipal business depended in large part on the county's fulfillment of its obligations. If the county had not mailed the monthly warrants, petitioner would, in effect, have had to repossess the equipment and return the money to the bank.

In addition, as the Tenth Circuit held in a similar case —*United States* v. *Gann*, 718 F.2d 1502, 1504 (1983) — in these circumstances it is irrelevant whether the warrant was mailed to a bank or to petitioner's company. Both the commissioner and the supplier knew that it was customary practice for suppliers to assign lease-purchase agreements to banks and both parties relied on the banks to pay petitioner the amount owed on the contract in return for the monthly installments paid by the county. "Absent the financing arrangement between the vendor and the Bank, the county would have paid the money directly to the vendor * * *. [Hence] the county's payment to the Bank, instead of to the vendor, was an integral part of the entire transaction and in furtherance of the scheme to defraud county citizens." *Ibid.* In short, there is no reason to reward petitioner's use of a more sophisticated mechanism for the illegal flow of funds where the substance of the arrangement is simply a variation on an undoubtedly unlawful mail fraud.[6]

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[6]In any event, because petitioner's sentence on the lease-purchase counts is concurrent to his sentence on other counts, further review is unnecessary.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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